



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-249

Appeal M-9300184

Marathon Police Services Board



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ORDER

BACKGROUND:

The Marathon Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the blood/alcohol reading of a named individual (the affected person), the identity of the individual who took the reading and the time at which the reading was taken. The request went on to state that "a copy of any witness statements" was required.

The Police provided access to a witness statement. Pursuant to section 21(1)(b) of the Act, the Police notified the affected person who declined to consent to the disclosure of the information which might affect his interests. The Police subsequently denied access to the remaining information based on section 14(1) of the Act. The requester appealed the decision.

Mediation of the appeal was not successful and notice that an inquiry was being conducted to review the decision of the Police was sent to the appellant, the Police and the affected person. Representations were received from all three parties.

After the representations were received, it was apparent that the appellant believed that the record which the Police had identified as being responsive to the request contained information which, in fact, it did not. The appellant was advised of this situation and provided with the opportunity to make further representations on the information which **was** contained in the record. Additional representations were received from the appellant.

The appellant agreed that the record at issue in this appeal consists of the requested information contained in a one-page document entitled "Certificate of Analysis". This document contains the following information which the Police and the appellant agree is responsive to the request:

- (a) the name of the analyst who performed the analysis on the affected person's blood sample; and
- (b) the results of this analysis.

Accordingly, these two items of information, contained in portions of the "Certificate of Analysis", constitute the records at issue in this appeal.

The "Certificate of Analysis" does not include the name of the individual who took the sample, nor the time(s) or place at which the sample was taken.

ISSUES:

The issues arising in this appeal are:

- A. Whether the information at issue qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information at issue qualifies as "personal information" as defined in section 2(1) of the Act.

Section 2(1) of the Act states, in part:

"personal information" means recorded information about an identifiable individual, ...

One of the pieces of information at issue is the name of the individual who conducted the analysis of the blood sample. I am satisfied that this individual's name and the fact that he performed the analysis does not constitute the personal information of the affected person. I will now determine whether this information constitutes the personal information of the analyst.

This individual is an employee of the Ministry of the Solicitor General who is a person designated by the Solicitor General of the Province of Ontario pursuant to subsection 254(1) of the Criminal Code of Canada as an analyst for the purposes of section 258. In my view, this individual was clearly executing his employment responsibilities when he conducted the analysis. Past orders of the Commissioner's office are clear that such information is not "personal information" as defined in section 2(1) of the Act (Orders P-270, P-257, P-369, P-377 and P-427). Because the name of this individual does not constitute "personal information", the mandatory exemption provided by section 14 of the Act cannot apply. As this was the only exemption claimed by the Police to deny access to this information, it should be disclosed to the appellant.

I am satisfied that the balance of the information at issue, namely the results of the analysis of the blood sample of the affected person, constitutes recorded information about the affected person and qualifies as his "personal information" as defined in section 2(1) of the Act.

ISSUE B: If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies.

Under Issue A, I found that some of the information at issue constitutes the personal information of the
[IPC Order M-249/January 19,1994]

affected person. Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits the disclosure of the personal information to any person other than to the individual to whom the information relates, except in certain circumstances. Specifically, section 14(1)(f) reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Because section 14(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 14(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would result in an unjustified invasion of personal privacy. Section 14(3) identifies specific types of personal information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. In their representations, the Police submit that sections 14(3)(a) and (b) of the Act apply to the information in question. These sections state:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

I will first consider the application of section 14(3)(b) of the Act.

Based on the representations provided by the Police, I am satisfied that the personal information contained in the record was compiled and is identifiable as part of an investigation into a possible violation of law, an investigation conducted by the Police into a possible violation of the Criminal Code of Canada as a result of a motor vehicle accident. The appellant agrees.

However, he submits that the disclosure of the information at issue in this appeal is necessary to "continue the investigation", i.e. that one of the exceptions in section 14(3)(b) applies in the circumstances of this case.

He maintains that the investigation referred to in section 14(3)(b) of the Act need not be confined to the Police investigation, but includes any investigation conducted by any party, including the investigative activity of a private party seeking to enforce its legal rights.

As a result of the Police investigation, the affected person was charged under the Criminal Code of Canada. Because of some procedural problems, the charges against the affected person were dropped. It is clear that the investigation by the Police is over, and that the disclosure of the record is not necessary to continue the **Police** investigation. In my opinion, the exception contained in the phrase "continue the investigation" refers to the investigation for which the personal information was compiled, i.e. the investigation "into a possible violation of law". It is, therefore, my view that the personal information requirements for a presumed unjustified invasion of personal privacy under section 14(3)(b) have been established and that, in the circumstances of this appeal, the exception does not apply.

I therefore need not consider the application of section 14(3)(a) of the Act.

Once a presumption under section 14(3) of the Act has been established, it may only be rebutted by the criteria in section 14(4) or by the compelling "public interest" override in section 16 (Order M-170). I am of the opinion that none of the information at issue falls within the ambit of section 14(4) of the Act.

The appellant submits that section 16 of the Act applies in the circumstances of this appeal. This section states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and **14** does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

There are certain requirements in section 16 of the Act which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption, as distinct from the value of disclosure of the particular record in question (Order 24).

While the burden of proof as to whether an exemption applies falls on the institution, the Act is silent as to who bears the onus of proof in respect of section 16. Where the application of section 16 to a record has been raised by an appellant, it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the record before making his or her submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by the appellant.

Much of the appellant's argument regarding the public interest in the disclosure of the record relates to his view that there is a compelling public interest in having matters determined by the courts and in ensuring that the courts have all relevant information and evidence before them for their consideration. These submissions would be more compelling if the court process did not allow for alternative disclosure mechanisms;

however, the litigation process does provide for alternative disclosure mechanisms which are available to parties commencing legal actions.

In addition, the appellant submits that he requires the information to enforce his legal rights to compensation as a result of the accident. In my opinion, while it may be that the appellant satisfies the criteria necessary to show that disclosure of the personal information is relevant to a fair determination of his rights, this is a section 14(2)(d) argument which, by itself, cannot rebut a section 14(3) presumption. It is also an argument that relates to the personal rights "affecting the person who made the request", rather than any public interest.

The appellant's argument on the application of section 16 of the Act is similar to that advanced by the appellant in Order 12 in which a request had been made for an individual's address in order to personally serve that person with a Statement of Claim to commence legal proceedings. Former Commissioner Sidney B. Linden stated in that order:

In this case, the appellant, as agent for a landlord, is seeking access to the current address of one of the landlord's former tenants in order to personally serve a statement of claim on the former tenant, on behalf of the landlord. Section 23 [the equivalent to section 16 of the Act] does not apply because the appellant's interest fails on both counts; it is neither compelling nor a public interest.

I believe that the same may be said of the circumstances of the present appeal. The appellant's interest in the disclosure of the personal information of the affected person is a **private** interest related to the appellant's preparation for a civil proceeding against the affected person. Also, I am not satisfied that there is a compelling interest at issue in this appeal.

Having reviewed the information which I have found subject to exemption, I find that there is no compelling public interest at stake. Accordingly, it is my view that section 16 of the Act does not apply.

ORDER:

1. I order the Police to disclose the name of the analyst to the appellant within fifteen (15) days of the date of this order.
2. I uphold the decision of the Police to deny access to the results of the analysis of the blood sample of the affected person.
3. In order to verify compliance with the provisions of this order, I order the Police to provide me with a copy of the information which is disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by:
Anita Fineberg
Inquiry Officer

January 19, 1994